

Some Aspects of the Law We Thought You Should Know About

Compiled by the **KWAZULU-NATAL ASSOCIATION OF
PUBLIC SECTOR LAWYERS**



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FOREWORD

This booklet is the product of a combination of short articles, embracing legal topics written by KAPSL¹ members, that we believe are of general interest to the public. The initiative began when an arrangement was reached with the Centre for Adult Education at the University of KwaZulu-Natal who are responsible for “*Learn with Echo*”, a supplement to the *Natal Witness*, a widely read newspaper in KwaZulu-Natal. It was agreed that KAPSL members provide the articles in English and that they would be translated and published in “*Learn with Echo*” in isiZulu. The articles proved popular and have taught readers about some of their basic rights and helpful aspects of the law. It was decided that a more permanent publication was needed and, hence, this booklet. We hope to be able to publish more editions in future.

We trust that you will enjoy the articles and that they will not only be of interest to you, but will serve as a tool for the education and empowerment of our citizens.

Mr S Chili
KAPSL Chairperson

¹ KAPSL is the acronym for the KwaZulu-Natal Association of Public Sector Lawyers, the representative body of the organised legal profession in the public sector in KwaZulu-Natal. KAPSL is an independent voluntary professional association regulated by its own constitution. In exercising some sense of social responsibility and social conscience, KAPSL also plays an activist role in, amongst others, informing citizens of their rights. To learn more about KAPSL, go to www.KAPSL.org.

CONTENTS

Foreword	3
The Promotion Of Administrative Justice Act.....	5
The Promotion Of Access To Information Act	7
The National Credit Act and the Transformation of Credit Facilities in South Africa	9
The Small Claims Court	12
Collective Bargaining: Rights of an Employee to Join Unions and Participate in Strikes	18
Unfair Dismissal Disputes Relating to Misconduct.....	22
Harassment at Work.....	26
Domestic violence.....	32
Medical Negligence	38
Drawing up a Will	40
Deceased Estates.....	45
You and Your Grant.....	48
Independent Contractors and TES Workers	55
Builders	60

THE PROMOTION OF ADMINISTRATIVE JUSTICE ACT

Our Constitution is the supreme law of the land. As such it has to be adhered to by everyone, including the President and Government Departments. In the Constitution is a Bill of Rights. The Bill of Rights is made up of sections in the Constitution which give certain fundamental rights to all persons living in South Africa. Some examples are the right to life, the right to health care, the right to education and the right to privacy. Section 33 of the Constitution gives us the right to just administrative action. The same section required that a law be drafted to give effect to the right and thus the *Promotion of Administrative Justice Act, 2000* (Act No. 3 of 2000), or PAJA, was drawn up and put into operation.

What is a right to just administrative action and how is it achieved?

When decisions are taken by government officials these decisions can often affect people in a negative way. For example, if you are applying for an old age pension, the decision **not** to grant you that pension would have a negative effect on you. So, in order to make the process of reaching the decision fair and just, before making a final decision the official making the decision must ask you to make representations as to why he or she should not make that decision. This will give you the opportunity to give the official more information which may be important to change his or her mind.

The official has to consider any representation made by you before making a final decision. Once a decision has been made, the official must advise you of what decision was made and give you reasons for the decision or tell you that you may ask for reasons. All of these notices must be in writing and people must

be assisted if they have trouble understanding the notices sent to them.

There is also a process to ensure that groups of people are fairly treated. For example, if Government wants to build a road through a residential area a number of people would be affected. They would have to be consulted and be given the opportunity to make representations. This is done either by having meetings and recording comments or by putting up a notice asking for comments. In the same way the officials have to consider all comments before taking a decision and would have to give reasons for their decision.

This is a very important right in our democracy because, since we are entitled to be heard about a decision that will affect us and because we are entitled to reasons, officials have to be open and transparent when making decisions and are less likely to be biased. For example, if I tender for a Government contract and the decision is not to award it to me, I am entitled to know why and assess whether I have been treated unfairly. This will help me to decide if I should take the case to court on review. If I do, the court will decide if the decision was unfair on a number of grounds, which include bias, misapplication of the facts or law, that the person taking the decision was not authorised, that it was procedurally unfair, taken in bad faith or taken for an ulterior purpose. All in all, the right to be treated fairly makes our relationship with Government more pleasant and, as we know officials can't do as they please, there is far less chance that they can be corrupt.

Mr M Serfontein

THE PROMOTION OF ACCESS TO INFORMATION ACT

Our Constitution is the supreme law of the land. As such it has to be adhered to by everyone including the President and Government Departments. In the Constitution is a Bill of Rights. The Bill of Rights is made up of sections in the Constitution which give certain fundamental rights to all persons living in South Africa. Some examples are the right to life, the right to health care, the right to education and the right to privacy. Section 32 of the Constitution gives us the right to information. The same section required that a law be drafted to give effect to the right and thus the *Promotion of Access to Information Act, 2000* (Act No. 2 of 2000), or PAIA, was drawn up and put into operation. This is a very important right in our democracy because, since we are entitled to information which government has, it forces government to be open and transparent. In the previous regime, government often operated under a veil of secrecy and kept information to itself. When all of what government does can be accessed, this veil of secrecy is lifted and there is far less chance that officials can be corrupt.

In terms of PAIA everyone can access records held by any organ of state – which includes Government Departments and Municipalities and any organisation doing the work of Government. It is not necessary to say why you want the information and all you have to do is fill out a form which you can get from the department concerned or from the website of the department, and pay a fee. At the moment the basic fee is R35.00 and if there are many copies to be made or other expenses incurred you will also have to pay for these. Every department has an Information Officer and Deputy Information Officers who will deal with requests for information.

You are also able to get information from private companies if you can show that you are exercising a right or are protecting a right. For example, the Bill of Rights gives us a right to an environment that will not harm our health. If a petrol refinery is polluting the air, we have a right to know what they are doing and get information about what processes they are using. The same process will be followed to get the information and a form will be completed setting out the information you want and a fee will need to be paid. People who earn less than a certain amount do not have to pay the fees.

While the Constitution gives us certain rights these must be limited in some way. For instance, no one would like to know that their own personal information will be given out to anyone who wants it. Your state of health is private. Because of this PAIA specifies that in certain circumstances information can be withheld. Apart from personal information not being available to other people, certain other information can be refused if there are good reasons to do so. If you don't agree with a decision to withhold information you can take this on appeal to the Member of the Executive Council responsible for the department or the Municipal Manager. If your appeal fails you can then go to court.

The South African Human Rights Commission is responsible for ensuring that all Government Bodies and Private Bodies comply with PAIA. If there are problems, or if you need assistance, you should speak to the Commission. In KZN the contact details of the Commission are: Tel: (031) 304 7323/4/5 or Fax: (031) 304 7323.

Mr M Serfontein

THE NATIONAL CREDIT ACT AND THE TRANSFORMATION OF CREDIT FACILITIES IN SOUTH AFRICA

The *National Credit Act, 2005 (Act No. 34 of 2005)*, commonly known as NCA, is one in the series of legislative interventions that the government has introduced since the advent of constitutional democracy in South Africa. This piece of legislation, amongst other pieces of legislation, has had far-reaching implications on the administration and management of credit facilities in the country and has brought about extensive protection to consumers in general.

For purposes of the discussion that follows, certain aspects of the said Act are deliberately highlighted, namely:

- the purpose and application of the Act; and
- the different types of credit agreements that are dealt with in the same Act.

The stated over-arching purpose of the Act, as provided for in section 3, broadly, is to promote and advance the social and economic welfare of South Africans, to promote fair, transparent, competitive, sustainable, responsible, efficient, effective and accessible credit markets and industry and to protect the consumers.

On the other hand, section 4 deals with the broad scope of the application of the Act as well as instances of its exclusion and/or limited application. The credit agreements that are excluded from the Act, or where the application of the Act is limited, include:

- (a) stokvels;
- (b) credit agreements contemplated in sections 5 and 6 of the Act;
- (c) insurance policies extended by the insurer for the sole purpose of maintaining the payment of premiums;
- (d) lease agreements on immovable property; and
- (e) developmental credit agreements (e.g. section 10(1)(ii) – student loans).

The Act introduces and also defines three categories of credit agreements, depending on the applicable threshold, and these are classified in terms of small, intermediate and large credit agreements. Unless a certain class of transactions is specifically excluded or exempted by the Minister in terms of section 11 of the Act, the rest of these credit agreements would be subject to, and must comply with, the provisions of the Act.

Another important development which the Act introduces is the representation by institutions such as the National Credit Regulator and the National Consumer Tribunal. The impact that these developments bring to the credit market is that the rights of the consumer are given increased protection. The evidence of such protection can be found around the whole concept of reckless credit or reckless lending, together with the consequences attached to the prohibited conduct by both the credit provider and the consumer respectively (sections 80 to 85 of the Act specifically deal with reckless lending and the consequences associated with it).

Impact of the Act on the market

It would seem that, generally, that the immediate impact of this piece of legislation on the market is, effective from 1 July 2007, that there would no longer be instances of unchecked financial over-indebtedness by consumers and that the Act requires

responsible lending on the part of credit providers. At the same time, the consumer has a duty to place at the disposal of the credit provider information so that the assessment of the consumer by the credit provider becomes a transparent process.

For more information and advice, consumers can contact the National Credit Regulator on a toll share number: 086 062 7627 or visit www.ncr.org.za or contact the Consumer Protection Directorate at the Department of Economic Development and Tourism – KZN during office hours on (033) 264 2500 or visit the offices at 270 Jabu Ndlovu Street, Pietermaritzburg, or visit any of the department's district offices located near your place of residence.

Mr S Chili

THE SMALL CLAIMS COURT

You can approach the Small Claims Court to bring a case against a person, a company or other organisation. You can claim for money that is owed to you or for money for harm that was done to you – compensation for the injuries that you suffered where someone else was to blame. This compensation is called damages.

The Small Claims Court makes it easy for you to institute minor civil claims quickly, in a simple manner and without the use of a lawyer. You speak for yourself and tell the Commissioner about your case.

Anyone who is over 21 years of age can bring a claim. If you are under 21 years old you will need to be assisted by your parent or legal guardian. A company, corporation or an association cannot use the Small Claims Court.

The maximum amount you can claim is R7 000. If your claim is more than R7 000 you can still go to the Small claims Court if you reduce the amount to R7 000 or less.

The following are the types of claims you can make:

- (a) claims for repayment of monies lent;
- (b) claims for the delivery of property where its value does not exceed R7 000 – for example if you have paid for something but you have not been allowed to take it away;
- (c) claims for outstanding rent and ejection;
- (d) claims arising from an acknowledgement of debt or a mortgage bond; and
- (e) claims arising from Credit Agreements.

What you cannot claim:

- (a) claims over R 7 000;
- (b) claims against the State;
- (c) claims based on the cession or the transfer of rights;
- (d) claims for damages in respect of defamation, malicious prosecution, wrongful imprisonment, wrongful arrest, seduction and breach of promise to marry;
- (e) claims for divorce;
- (f) claims concerning wills;
- (g) claims concerning the status of a person in respect of their mental capacity; and
- (h) claims for specific performance, for example, if someone has contracted to paint your house but refuses to do so.

Representation

You do not have to use the Small Claims Court but can choose to go to the Magistrate's Court. Remember that in the Small Claims Court you cannot be represented by a lawyer. You can, if you wish, obtain prior advice from a lawyer or advocate at your own cost. The Legal assistants and clerks of the Small Claims Courts will assist you free of charge.

Language

You must arrange with the clerk of the Small Claims Court for an interpreter, if you need one, during your case.

Process

If you are going to take your case to the Small Claims Court, you must:

- (a) contact the opposing party (person against whom you are instituting legal proceedings) in person, by

- telephone or in writing, and request them to satisfy your claim;
- (b) if the opposing party does not comply with your request, address a written demand (setting out the facts on which the claim is based, and the amount of the claim), giving them a minimum of 14 days from the date of receipt of your written demand to satisfy your claim;
 - (c) deliver the demand by hand or by registered post to the opposing party so that you have proof that you served them with a copy of the letter;
 - (d) after a lapse of a period of 14 days, report in person to the clerk of the court with your proof that the demand was delivered to the opposing party;
 - (e) take your written demand and the proof (e.g. post office slip) that it was delivered to the clerk of the court;
 - (f) provide the clerk of the court with any contract, document or other proof upon which your claim is based, or that has regard thereto, and with the full name and address (home and business addresses, if available) and telephone number of the opposing party;
 - (g) the clerk of the court and the legal assistant will examine your documents and assist you in drawing up a simple summons;
 - (h) the clerk will issue the summons and hand it to you;
 - (i) you can serve the summons on the opposing party in person (try to obtain an acknowledgement of receipt) or get the Sheriff of the court to serve it;
 - (j) you can hand the summons, together with the Sheriff's service fees, to the Sheriff in whose district the opposing party resides for service on the opposing party;

- (k) where the Sheriff has undertaken the service, you must obtain, prior to the date of the hearing, a copy of his written proof that he has done so;
- (l) the clerk will inform you of a date and time for the hearing of the case;
- (m) keep the contract, document and any other proof upon which your claim is based at hand; and
- (n) inform your witnesses, if any, of the date and time that the case will be heard and arrange for them to be present in court at the appointed date and time.

The Opposing party:

may, on receiving your letter of demand or summons:

- (a) comply with your claim;
- (b) deliver a written statement, containing the nature of his/her defence and particulars of the grounds on which it is based, to the clerk of the court and send a copy thereof to the claimant; or
- (c) institute a counterclaim by delivering a written statement, which contains the same particulars as those required for a summons to the clerk of the court.

What if the opposing party has satisfied your claim in the meantime?

You must supply the opposing party with a written receipt and inform the clerk of the court immediately that your claim has been satisfied and that you will no longer proceed with the case.

If the opposing party has not satisfied your claim, the case continues to a hearing.

You must, on the appointed date and time of the hearing:

- (a) appear in court in person;

- (b) ensure that you have with you all the documents upon which your claim is based;
- (c) ensure that all your witnesses, if any, are present; and
- (d) ensure that you have the written proof that the summons was served on the opposing party.

The hearing

- (a) The court procedures are informal and simple.
- (b) No advocate or attorney may appear on your behalf.
- (c) The commissioner of the court will request that you state your case. State the facts as concisely as possible.
- (d) Answer the questions of the commissioner and submit your exhibits.
- (e) No cross-examination between the parties is allowed. With the commissioner's permission you may, however, put a few questions to the opposing party.
- (f) Listen attentively to the opposing party's explanations and, once they have finished talking, bring to the attention of the commissioner any facts which, in your opinion, they have not presented correctly.
- (g) After the commissioner has heard you, your opposing party and any witnesses that may be present, he or she can pass judgement. (The commissioner may also indicate that he/she will notify you of the judgement in writing at a later stage).

Appeal and review

No appeal may be filed against the judgment or order of the court. The court proceedings may be referred to the High Court for review on three grounds only:

- (1) absence of jurisdiction by the court;

- (2) interest in the cause, bias, malice or corruption on the part of the commissioner; or
- (3) gross irregularity with regard to the proceedings.

Steps following judgment

In case judgement is given against you:

The judgement of the court is final, unless some ground for review exists. Settle any order for costs that the court may make against you. The only possible costs can be those that the opposing party may have had in respect of fees for the sheriff. Abide by the decision of the court.

In case judgment is given in your favour:

Your opposing party will immediately pay you the amount of the judgement, if they have the money available. Give the opposing party a receipt for the amount immediately. In case your opposing party cannot comply with the judgement forthwith, the court will investigate their financial position and ability to settle the judgment debt and make an order for payment thereof.

If the judgement debtor fails to comply with the judgment or order of the Small Claims Court and you want to enforce the judgement or order concerned, the matter is transferred to the Magistrate's Court and the execution procedure, as prescribed by the *Magistrate's Courts Act, 1944 (Act No. 32 of 1944)*, is followed. It is advisable to make use of legal representation with this procedure.

Please note that this merely informs you of the most important steps to be taken with regard to the institution of a case in the Small Claims Court. Should you require assistance with any matter at all, the address and telephone number of the clerk of the Small Claims Court can be obtained from your local Magistrate's Court. In the Pietermaritzburg area this number is (033) 355 5228.

Ms T Naidoo

COLLECTIVE BARGAINING: RIGHTS OF AN EMPLOYEE TO JOIN UNIONS AND PARTICIPATE IN STRIKES

The advent of democracy has brought us the *Constitution of the Republic of South Africa, 1996*, “the Constitution”, which is the supreme law of the country and is above all legislation. The Constitution is made up of chapters and one of its chapters is the Bill of Rights which has a list of basic fundamental human rights accorded to citizens and individuals permanently resident in South Africa.

Amongst the rights in the Bill of Rights is the section 23(1) right to fair labour practices. Further to this basic fundamental right, section 23(2) of the Constitution also gives every worker the right to form and join a trade union and to participate in trade union activities, including performing duties as a shop-steward.

There is also national legislation that gives effect to the rights contained in section 23 of the Constitution. Amongst such legislation is the *Labour Relations Act, 1995 (Act No. 66 of 1995)* (LRA), which regulates the organisational rights of trade unions, the right to strike and promotes employee participation in decision making through the establishment of workplace forums.

There is also the *Employment Equity Act, 1998 (Act No. 55 of 1998)*, which seeks to achieve equity in the workplace by promoting equal opportunity and fair treatment in employment through the elimination of unfair discrimination.

There is also the *Basic Conditions of Employment Act, 1997 (Act No. 75 of 1997)*, which gives effect to and regulates the right to fair labour practises by enforcing basic conditions of employment. Amongst these basic conditions of employment is the regulation of working time (section 7), daily and weekly rest

periods (section 15), pay for work on Sunday (section 16), pay for annual leave (section 21), regulation of sick leave (section 22), etc.

The focus of this article is only on the right of an employee to form and join a trade union, to participate in the activities and programmes of a trade union and to strike. With collective bargaining, the balance of power between the employer and the employees as a collective is equal and thus the playing field, as far as employer/employee relationships are concerned, is levelled.

Section 4(2) of the LRA gives trade union members rights to stand for election and to be eligible for appointment as office-bearers or officials and, if elected or appointed, to hold office in that trade union.

Section 5 of the LRA also prohibits an employer from preventing an employee from becoming a member of a trade union and precludes an employer from acting to the detriment of an employee “because of past, present or anticipated... membership of a trade union” or participation in its activities.

Section 5(1) of the LRA provides that –

“no person may discriminate against an employee for exercising any rights conferred by this Act”.

CASE LAW

As mentioned above, section 23(4) of the Constitution and sections 4 and 5 of the LRA, give every employee the right to form and join a trade union and to participate in trade union activities, including performing duties as a shop-steward.

Case Law also confirms this position. In one case the judge held that senior managerial employees have an **unfettered right to join and hold office in trade unions but remain bound to perform the duties** for which they were engaged. Employees

who breach this duty of fidelity towards their employers in the course of their trade union activities may be disciplined for doing so, but not for holding union office *per se*. The court accepted that, by committing themselves to unions, employees “go over to the opposition” in the conflict between capital and labour.

In another case it was found that there is nothing absurd about permitting managerial employees to participate in trade union activities provided that they perform their contractual duties. In this case, an employee who was a shop-steward and union office-bearer was offered a managerial position as an alternative to retrenchment, on condition that he relinquish his union position as a shop-steward. After accepting the managerial position, the employee refused to resign as a shop-steward. As a result, he was retrenched for not complying with the condition to resign as a shop-steward. The employee then lodged his claim against the employer, for unfair dismissal.

In considering the matter the judge held the view that, as employees have an absolute right to be members of a trade union and to participate in its lawful activities, irrespective of their seniority, it would be unlawful for an employer to deny an employee promotion into a senior rank if he refuses to relinquish his shop-steward and/or office-bearer duties and responsibilities. Secondly, if any employee, for that matter, fails to perform his duties as an employee in any respect whatsoever, he needs to be dealt with in terms of the clear and accepted principles applicable to employees who fail to perform.

The court found that the employer breached the employee’s rights in terms of the LRA and that the employer acted unlawfully in demanding that the manager abandon his rights to participate in lawful union activities. As the dismissal of the employee was based on compliance with the unlawful demand it was found that the dismissal was unlawful and unfair and that it discriminated against the employee on the grounds of his union affiliation.

CONCLUSION

Based on the above observations, collective bargaining is a right within the ambit of section 23 of the Constitution, 1996, and all employees, irrespective of rank or contractual arrangements, have an **unfettered right** to join and hold office in trade unions but remain bound to professionally and impartially perform the duties for which they are employed.

Employees who breach this duty to perform professionally and impartially towards their employers in the course of their trade union activities may be disciplined for doing so, but not for holding union office *per se*.

There is adequate legislative and policy framework giving effect to the rights enshrined in section 23 of the Constitution.

Adv. B Tlhale

UNFAIR DISMISSAL DISPUTES RELATING TO MISCONDUCT

What can you do if you think you've been unfairly dismissed from employment for misconduct?

(This article assumes that you have already exhausted your internal appeal process, should your former employer have one).

Firstly, contact the Human Resources or Labour Relations Section of your former employer to find out if your employer falls under a council, or whether it falls under the Commission for Conciliation, Mediation and Arbitration (i.e. the CCMA). Next, contact the council or CCMA and request referral forms.

You will need to refer the dispute to conciliation. Conciliation is a form of dispute resolution in terms of which a neutral third party (i.e. a Commissioner) tries to guide the parties to a settlement of the dispute. If a settlement is reached, the Commissioner will ask the parties to sign a settlement agreement. If the parties cannot reach a settlement within 30 days of conciliation, the Commissioner will issue an Outcome Certificate, stating that the dispute has not been resolved. Conciliations are held "without prejudice". This means that anything that is said or handed in by either party in conciliation may not be used by the one party against the other party at a later stage. In other words, conciliation is a confidential form of dispute resolution.

Should the dispute not be resolved, and you wish to take the matter further, it is your or your representative's responsibility to refer the dispute to arbitration by filling in the arbitration referral forms and serving them on your former employer. (A former colleague, your trade union representative or a lawyer may represent you). You or your representative will then receive a Notice of Set Down for the arbitration. This form will indicate

who will arbitrate the case; on which date the matter is set down; the venue for the arbitration; *et cetera*.

When the day of the arbitration arrives, the Commissioner may first try to narrow the issues. (He or she may try to establish whether or not you are disputing your dismissal on procedural or substantive grounds or both, as he or she has no knowledge of your dispute). Before the arbitration proceeds, points *in limine* may be raised by the other side. The types of issues raised at this point in the process are, for example, that the dispute was brought out-of-time (i.e. too late). (If this is the case, the council or CCMA would probably have advised you to apply for condonation for the late referral of the case when filling in your referral for conciliation forms). This is a separate hearing from the conciliation and arbitration, and should be set down before the conciliation is heard. Whether or not you are successful in applying for condonation will depend on the reasons for your late application for the dispute to be heard. After the Commissioner appointed to hear your condonation application has heard both sides' motivation for or against condonation, the Commissioner issues a written Ruling on this issue alone. If condonation is not granted, then you may not proceed any further with your dispute. If condonation is granted, then you may refer it for conciliation. The Commissioner appointed to hear the arbitration will make a ruling or rulings on any other points *in limine* before proceeding with the arbitration.

The arbitration should then begin. Arbitrations are more formal than conciliations, and are different from conciliations in that the Commissioner (i.e. neutral third party) imposes his or her award (i.e. decision) on the parties. This award is final and binding on both parties to the dispute.

You will first need to prove that you have been dismissed. (This could be common cause – i.e. the employer may agree that you have been dismissed). If it is common cause that you have been

dismissed, then there will be no need to prove your dismissal. However, if the employer disputes your dismissal, you will either need to hand in documentary evidence in the form of a dismissal letter from your former employer, or you will have to lead oral (i.e. verbal) evidence to that effect.

Secondly, the employer will need to prove that the dismissal is fair. It must prove its case *de novo*. This means that the misconduct case against you will have to be proved right from the start again (in a way similar to your prior internal misconduct case). If you are disputing the procedural and substantive fairness of your internal misconduct case, then your former employer will have to prove that your dismissal was both procedurally and substantively fair. (A procedurally fair dismissal is one in which your former employer followed a fair procedure in dismissing you. A substantively fair dismissal is one in which the content of your former employer's case was such that it was able to prove, on a balance of probabilities, that you were guilty of misconduct and that dismissal was the most appropriate or reasonable sanction in the circumstances).

Your former employer needs first to prove its case, so it is required to begin. It should lead evidence either in the form of oral evidence, through witnesses, and/or through documentary evidence, by handing in documents. You or your representative will then have a chance to cross-examine the witnesses after they have each given evidence in turn. (Cross-examination is your chance to put your case to each witness, where relevant, and to dispute anything he or she says). Your former employer will then have a chance to clear up any of the evidence given by its witness or witnesses during cross-examination. This opportunity is referred to as re-examination.

It is now your turn to give your version of your case. You can choose whether or not to give evidence, and whether to call any witnesses to support your case. If you choose to give evidence,

you must give evidence before your witness or witnesses. Again, the evidence-in-chief; cross-examination; re-examination sequence is followed for your side.

When both parties have presented their cases, they have an opportunity to make a closing statement. This is your chance to put forward to the Commissioner the reasons why it is more probable than not that you should be found not guilty. Your former employer will address the Commissioner first as to why he or she should find you guilty of misconduct on a balance of probabilities. If the Commissioner finds you guilty of misconduct, both parties – beginning with your former employer's representative – will have a chance to motivate which sanction is most appropriate or reasonable for the misconduct in question. The Commissioner usually faxes or sends his decision to both parties – or the representatives if the sides are represented – within 14 days.

If the Commissioner finds you not guilty, the case itself will be dismissed and your internal dismissal will have been found to have been substantively unfair. The Commissioner may also find that your dismissal was procedurally unfair, if this was part of your dispute. If the Commissioner finds that you were unfairly dismissed, he or she may either order your reinstatement, or re-employment, or that your former employer pay you compensation. (Reinstatement means that you are employed with all the benefits you would have been entitled to had you not been dismissed, and that your employment is backdated to the date of your dismissal. Re-employment means that you are employed in your former job from the present date).

If the Commissioner finds that your dismissal was procedurally unfair, he or she may order a monetary award to be paid to you by your former employer.

Adv. C Dalby

HARASSMENT AT WORK

Harassment in the workplace is more common than you might think. Your employer has a duty to protect you from harassment, so it is important to know what your rights are in this regard. Harassment is against the law, but it also goes beyond just sexual forms of harassment and includes more subtle types of treatment which make your work life difficult.

What is harassment?

It is important to know that harassment in the workplace need not just be of a sexual nature. The law also views these sorts of behaviours as harassment as well:

- bullying;
- the spreading of untrue rumours about you or the ridiculing of you because of your race, gender or disability;
- being ridiculed or degraded;
- being excluded or picked on;
- being constantly criticised for no reason;
- unwelcome sexual advances;
- your boss abusing his or her power or being overbearing in their supervision of you;
- having threats made against you about your job security if they have no basis (i.e. that you are going to be fired soon, or you are going to be demoted); and
- being prevented from advancing in your job by someone purposefully blocking your opportunities or even potential training for you.

These are just some of the examples of harassing behaviour in the workplace. Labour law tells us then that harassment is any

behaviour that is 'unwelcome, unwanted and has a destructive effect'. You can see that all these things would have a very negative effect on your quality of life in the office, which is why the law gives such a broad definition: it is an attempt to try and ensure your wellbeing at work as much as is possible. These forms of harassing behaviour are a violation of your constitutional rights.

Practical advice

The law does try to protect you, but there are steps you can take outside of the law to help yourself in such a situation. The first is probably the most important: you should confide in people about the harassment. Do not keep quiet because you are scared, as people who harass like to keep you isolated as it makes you less powerful and less able to stand up for yourself. It is important to look at the people who might harass you in the workplace as really just adult versions of schoolyard bullies: they are using their power over you to make you feel weak and victimised. If you speak up about it, you may discover that you are, in fact, not alone and that this harassment is happening to others in the office as well.

It is very important to keep a written record of all incidences of harassment. These should be detailed, as they will help in any formal grievance process you might chose to pursue later. This means recording details like what happened, how you responded and if there were any witnesses to the incident.

Sometimes you should try and use informal ways of dealing with the problem as a first step. You might try and speak to the person who you feel harassed by if you feel safe enough to do so. The best thing might also be to do this in front of other people, so that you have witnesses who can say that you have tried to address the problem informally. This kind of approach should be done in the least confrontational way possible. You might also feel it best

to confront them in writing, and then this written record can be added to your collection of records about the harassment.

Internal procedures

If you are a part of a union, you can approach your union representative or shop steward first for advice and assistance. Once you have decided to make your complaint formal, you can lodge your complaint, or 'grievance', through your company's internal grievance procedures (which most companies will have in place). This complaint should be kept confidential. You can do this because your employer has a legal duty to protect you from harassment and also to educate you and other employees about harassment. This means that the employer himself might be liable if you have been harassed and they have not done enough to prevent it. Most importantly, employers are under a duty to develop clear procedures to deal with the issue (including such details as your time frames) which is why you should be able to lodge the complaint with ease. You should be able to get details about these procedures from your Human Resources Department, Personnel Department or one of your managers.

Your employer must then investigate the matter and, if necessary, discipline the perpetrator, which can be done through warnings, or even a dismissal. Remember: the employer *must* investigate your complaint once you have laid it. Any form of disciplinary hearing which may happen because of your complaint should also ensure that both sides of the story are heard, otherwise it will not have been procedurally fair.

What if your employer doesn't do what he or she is supposed to?

If your employer does not do any of the things that they are obligated to do, as discussed above, you should then move on to your Bargaining Council (if you have one) or the Commission for Conciliation, Mediation and Arbitration (CCMA). If they cannot

sort your complaint out through conciliation, they might then refer the problem to the Labour Court.

You should also note that, at a smaller company, you may not have a sufficiently built-up human resources department to have the internal grievance procedures open to you. If this is the case then you should just go to the CCMA directly. Approaching the CCMA directly might also be the best option if the person who has been harassing you is your ultimate boss.

For more information about harassment, you can contact a CCMA satellite office for advice. The contacts for the different branches can be found at the CCMA website at www.ccma.org.za. Always remember that Legal Aid cannot assist you with labour matters.

Unfair discrimination

Harassment may also constitute unfair discrimination as well if it involves the unequal treatment of employees on the basis of such things as race, age, gender, sexual orientation, etc. This means that you could also have the option of complaining by using the *Promotion of Equality and Prevention of Unfair Discrimination Act, 2000 (Act No. 4 of 2000)*. In section 21 it says that a court of law must hold an inquiry about an alleged issue to determine whether unfair discrimination, hate speech or harassment has, in fact, taken place.

This option is then an additional option to the routes above where you can also file a complaint internally, or directly to the CCMA.

Constructive dismissal

You might have experienced such bad harassment, however, that you have already left your place of work. This does not mean that all doors for complaining are now closed to you. Often senior people may harass you in the hope of forcing you to quit

a company because you are so unhappy, rather than following the proper dismissal procedures. The law says that this kind of behaviour by an employer is unlawful. If you feel that you have been forced out of your position at your work because your employer has made it 'intolerable' for you to stay and you had no other option but to leave, then you may have a claim for constructive dismissal which you can pursue at the CCMA. Constructive dismissal is simply the term used because your employer, without having a proper or justifiable reason for firing you, has 'constructed' circumstances that will bring about your leaving.

When you go to the CCMA you must always remember that you have to show that your employer made your working life so intolerable that you had no option but to quit. This might seem like a difficult thing to show, but again you can approach the CCMA for advice on how to properly word your complaint to show the unfairness of what has happened to you.

Remember

- Harassment goes beyond sexual harassment: it includes all kinds of behaviour which would make your work life intolerable.
- Do not keep quiet about your harassment.
- You can lay a complaint internally, as the law says there should be procedures in place to protect you from harassment,
- Your employer has a legal duty to investigate your complaint.
- If your company does not properly deal with your complaint, or cannot deal with it at all, you can complain directly to the CCMA.

- Harassment might constitute unfair discrimination and you will then have more complaint procedures open to you.
- Even if you have left your company because of the harassment, you may still be able to hold your company accountable for constructive dismissal.

Ms G Razzano (Honorary Member)

DOMESTIC VIOLENCE

The *Domestic Violence Act, 1998 (Act No. 116 of 1998)* was passed to protect victims of domestic violence. Domestic violence impacts on adults and children alike. The Act adopts a wide approach to the concept of a domestic relationship as it includes married couples as well as heterosexual and homosexual relationships.

The term “*domestic relationship*” has a wide definition in order to cover all possible situations of abuse. This includes:

- (a) a relationship between a complainant (the victim) and a respondent (the alleged abuser) which stems from an existing or former marriage;
- (b) marriages according to any law, custom or religion;
- (c) the situation where persons live together in a relationship similar to a marriage, including same sex or opposite sex relationships;
- (d) the parents of a child or persons who have or had parental responsibility for that child;
- (e) family members related by consanguinity, affinity or adoption;
- (f) engaged persons, persons in a dating or customary relationship; and
- (g) persons who share the same residence.

The Act speaks of a “complainant”, being the individual in a domestic relationship who is suffering the harm, and a perpetrator, who has allegedly committed an act of domestic violence and who is referred to as the “respondent”. The acts of abuse or domestic violence can be any one or all of the following:

- physical abuse; sexual abuse; emotional, verbal and psychological abuse; economic abuse; intimidation; harassment; stalking; and damage to property.
- Entry into the complainant’s residence without consent, where the parties do not share the same residence, is also included as well as any other controlling or abusive behaviour towards a complainant which threatens, or may threaten the safety, health or wellbeing of the complainant.

Domestic violence is not limited to physical abuse or harm but also extends to economic abuse. For example, one spouse may withhold money for the payment of household necessities. The Act makes provision for emergency monetary relief – that is compensation for monetary losses suffered by a complainant at the time of the issue of a protection order as a result of the domestic violence, including loss of earnings; medical and dental expenses; relocation and accommodation expenses; or household necessities;

Economic abuse is also widely defined in the Act. It includes the:

- (a) unreasonable deprivation of economic or financial resources, including household necessities for the complainant, and mortgage bond repayments or payment of rent in respect of the shared residence; and
- (b) unreasonable disposal of household effects or other property in which the complainant has an interest.

Emotional, verbal and psychological abuse means a pattern of degrading or humiliating conduct towards a complainant such as insults, ridicule or name calling, threats to cause emotional pain, repeated obsessive possessiveness or jealousy.

Harassment means engaging in a pattern of conduct that induces the fear of harm to a complainant. Intimidation means uttering

or conveying a threat, or causing a complainant to receive a threat, which induces fear.

What procedure must be followed by a victim of domestic violence?

A person who is a victim of domestic violence may apply to the court for a protection order. An application for the order may also be brought on behalf of a complainant by any other person. A counsellor, health service provider, member of the South African Police Service, social worker or teacher may also apply for a protection order, provided he or she has a material interest in the wellbeing of the complainant. If any of these persons applies for a protection order, the complainant must give his or her written consent.

Consent is not required where the application is made on behalf of a minor; a person who is mentally retarded; a person who is unconscious; or a person who is unable to provide the required consent. A minor, or any person acting on behalf of a minor, may apply to the court for a protection order without the assistance of a parent, guardian or any other person.

An application for a protection order must be heard by the court as soon as reasonably possible. The court may instruct the Family Advocate to investigate the situation regarding the welfare of any minor or dependent child.

If the court is satisfied that there is evidence of domestic violence, and that undue hardship may be suffered by the complainant if a protection order is not issued immediately, the court may issue an **interim protection order**.

A protection order may take various forms. It may prohibit the respondent from: committing any act of domestic violence; it may prohibit that person from enlisting the help of another person to commit any such act; it may prohibit him or her from entering a

residence shared by the complainant and the respondent; it may prohibit entering a specified part of such a shared residence; it may prohibit entering the complainant's residence; and so on.

If the court is satisfied that it is in the best interests of any child, it may refuse the respondent contact with such child, or order contact with such child on such conditions as it may consider appropriate.

If anyone is experiencing the forms of abuse listed above they need to take immediate steps to remedy the situation. Often, it is too late and the victim has again become a victim of abuse and the results could be disastrous.

Every Magistrate's Court has a domestic violence section and will be able and willing to assist a complainant immediately. Once the complaint is lodged, the complainant will be required to complete a set of forms and an affidavit, with the assistance of the domestic violence officer.

An interim protection order is then granted to the complainant; the interim order is served and explained to the respondent as soon as possible in order for it to be enforced. The respondent is thereby warned not to commit any acts of domestic violence against the complainant, with the threat of arrest and detention if he/she fails to comply.

A return date, on which both parties will be required to appear at court to present their cases, is allocated by the court and both parties are warned to appear on that day. On the return date the protection order will be made final; alternatively it may be amended or dismissed.

A protection order will not readily be dismissed by a court as the court has a duty to protect the public and specifically vulnerable groups of society. It has been recommended by the court that,

when reporting an incident of domestic violence and laying a complaint, the statement should include five essential elements:

- (a) a history of the abuse;
- (b) a description of the most recent incident of domestic violence;
- (c) evidence of any medical attention sought by the complainant as a result of the current incident or previous incident/s, or any other evidence to show that an act of domestic violence had taken place;
- (d) the complainant's knowledge of any previous criminal record of the respondent; and
- (e) the complainant's knowledge of any orders against the respondent with regards to family violence, protection orders, etc.

This information would help the court. There are people who are trained to assist you in a caring and sensitive manner.

If you have obtained a protection order and the respondent/perpetrator is violent or threatens violence, you must contact the South African Police Service (the police) and report the domestic violence. The police will obtain statements from the complainant and witness(es). If there is reason to believe that an act of violence has been committed, the respondent will be arrested immediately without a warrant. The police can search the premises and seize (for safekeeping) any firearms and/or dangerous weapons in the possession of the person who has either threatened to kill or injure another person. The police will also do this if they are satisfied that the offender's mental state, inclination towards violence and/or dependence on alcohol or drugs could influence his/her behaviour and pose a threat to anyone.

The police can also provide assistance with access to medical attention, shelter and victim counselling. They will inform you of the support services that are available in the area; alternative shelters, if available; counselling services, if required; medical assistance; free services that are available; and the time of day these services are available. They will go with you to your home when you need to collect personal belongings if this is provided for in a protection order that has been issued.

If you are being abused and subjected to domestic violence, do something about it now.

If you are, or somebody you know is, a victim of abuse, approach your local Magistrate's Court or SAPS today.

Ms T Naidoo

MEDICAL NEGLIGENCE

Whilst we appreciate what our doctors do for us and the sacrifices they make in very difficult circumstances to help sick and injured people, sometimes we hear about people who have been admitted to hospital suffering further injury or even death during their confinement. In most instances this is unavoidable due to the patient's condition but where the human element is involved there are sometimes mistakes of judgment that could have far-reaching effects. When we enter into a hospital or receive treatment from a doctor we consent to such treatment, whether we sign documents or not. When a procedure is performed, the risks associated with such procedure should be explained to the patient. Most hospitals will not proceed with treatment unless a written consent is signed by the patient. This means that we assume most of the risks involved in being treated and our consent to such treatment is informed. In a recent case a dentist, who had not explained the risks properly, had to pay damages to a patient who suffered permanent nerve damage whilst her wisdom teeth were extracted even though he had performed the procedure in the normal way. So, if you are about to have medical treatment, it is important to understand all the risks associated with it.

What is negligence?

Most of the cases we hear about involve negligence of a medical practitioner. A doctor will be considered negligent if he or she does not meet the standard expected of a reasonable practitioner having the same standard of training and experience. So, if you are being treated by a specialist, the degree of expertise expected of that person is higher than that of a general practitioner (GP). There are certain obvious cases of medical negligence. Where, for instance, a doctor forgets to remove a steel implement from a patient's body after performing an operation, this would be negligent. A doctor may also be negligent if he or she fails to

do something expected of him or her – for example, if a doctor fails to sterilise someone when required to, or fails to remove a tumour that spreads and causes further injury. Many cases, however, are not that clear-cut and proving negligence can be quite difficult. In order to succeed with a claim one must be able to prove negligence. This involves calling other doctors or experts to give evidence.

When can one claim?

In order to claim a patient must have suffered some kind of injury as a result of negligence. Of course, if someone dies as a result of negligence, his or her dependants would have a claim for loss of support. The amount of a claim for injury would depend on the extent of those injuries. If someone becomes paralysed, for example, and is unable to work, the claim for damages would have to cover loss of earnings. Over and above the damages for loss of earnings and medical costs, a patient will be able to claim an amount for pain and suffering. The amount of such a claim would obviously be relative to the extent of the pain suffered. In the case of a failed sterilisation, the damages would cover the cost of supporting any child conceived.

Who can one claim from?

Firstly, a claim would lie against the medical practitioner. Where such practitioner is employed by someone else, such as the State or a private hospital, the employer would also be liable. In the case of the State this would be the Member of the Executive Council (MEC) responsible for health. Remember that if the claim is against the State, certain time limits exist within which a claim must be lodged and a claimant is well-advised to seek legal advice as soon as possible. There are also time limits if the claim is against a private doctor or institution. Most doctors would have insurance to cover themselves from crippling (excuse the pun) claims.

Mr M Serfontein

DRAWING UP A WILL

The idea of drawing up a Will makes many people uncomfortable. However, it is necessary to plan for what will happen to your property when you pass away. A Will ensures that your property is divided up after your death as you would have wanted it to be. You need to have your wishes written down so that there can be no argument about what it is that you wanted after you are gone. If you do own possessions, you should draw up a Will as soon as is possible.

Why draw up a Will?

If you pass away without drawing up a Will, then the law says that you have died 'intestate'. What this means is that, because there is no written account of what will happen to your things, the law will have to decide on how to divide it up on your behalf. This can even happen where you have drawn up a Will, but have not done so properly – a court can then declare the Will, or part of the Will, to be 'invalid'. They can do this, for instance, where you have left a request which is against public policy or unconstitutional, such as where you have left a request saying that someone can only inherit from you if they do something illegal. We will talk later about the things you can do to ensure that you have drawn up a legally valid Will.

There are many downsides to dying intestate (without a Will). The first is that, if you have not properly sorted out your estate (which is just a term for everything you own), then the courts need to decide what to do with it on your behalf, which can take a significant amount of time. This passing of time (and the possible costs of having to go to court) might mean that members of your family, who have previously depended on money from you, might suffer, because money won't be given to them until everything is finally sorted out.

This also means that the law may leave your things to people you do not want to leave anything to, or not give things to people you do want to leave to. A good example of this is that the law does not recognise 'cohabitating partners' (or someone who could be a long-term boyfriend or girlfriend) in the dividing up of your estate.

In South Africa, you are given a lot of freedom in deciding how you want your Will to work. You can choose to give your things to almost anyone, including to charities instead of people (the people you leave things to in your Will are called 'beneficiaries' because they 'benefit' from your Will). However, there are some things you have to do to make a Will legal and valid.

To draw up a valid Will

Any person who is 16 years or older can draw up their own Will, if he or she is mentally capable of appreciating the nature and effect of what they are doing. Sometimes people might claim later that you were not capable of drawing up your own Will, but then they will have to show a court that this is true, which can be very difficult to show later.

Your Will needs to be signed by you, and also by two witnesses who both watched you sign. A witness is only a proper witness when they are 14 years or older. When you do sign, you should sign as close as possible to the last line of your Will. Also, if you have more than one page in your Will, you should all sign each of the extra pages as well. If you cannot write, you can sign your Will with just a mark – but then you must do this in front of a Commissioner of Oaths as well so that they can make sure it is you that signed.

You can make changes to your Will, but to make sure it is all done properly I would suggest drawing up a new Will and making sure that all copies of your old Will are destroyed to avoid confusion. It will also help to include a clause, which is called a 'revocation

clause', in any Will. Very simply, this just says that all other Wills that have been drawn up before this one are no longer valid.

An executor

One important thing dealt with in your Will is selecting who will be your executor. The Master of the High Court is the one who officially picks the executor of your estate, but if you 'nominate' someone specific in your Will then the Master will generally just choose that person. An executor is simply the person who will be in charge of carrying out all the instructions in your Will. For many people, when they have consulted an attorney to draw up the Will, that attorney will be selected as the executor. The executor, however, is allowed to charge a fee for the work they do and so you may want to choose a family member instead. The duties can be complicated though – which is why people often select a professional. The duties can include evaluating what your property and debts are; preparing documents for the Master of the High Court; collecting together all your property and 'assets'; paying necessary legal fees; etc.

In order to deal with everything properly once you have passed away, the executor will need to have your key documents, such as your identity document; your death certificate; your marriage certificate; ante-nuptial contract; details of your beneficiaries; policy documents; etc. You should therefore try to keep all these kinds of documents together and let your beneficiaries know where you have put them.

Things to include

There are additional things that you need to remember when drawing up your Will. Before you even start, you need to determine what your estate consists of. This means you will need to write down a list of all your belongings, including such things as your house, car, insurance and life policies, retirement benefits, and even jewellery. However, you must also remember

to minus from your total all the things you owe money on, such as your mortgage and debts.

Always have a few signed copies of your Will kept in different places to make sure they are safe (each Will that is signed properly is considered to be a valid Will). It may be best to have four copies, each signed by you and your witnesses, and then kept by yourself, a friend, your bank and your chosen executor.

The most important concern for people with children is ensuring that you choose a guardian to look after them, should anything happen to you. You might also consider making a trust in your Will, often referred to as a Guardian's Fund, which sets aside money to be used by the guardian to raise your kids. Whenever a Will includes things like a trust, it is important to seek the assistance of an attorney for more advice.

When you name anything in your Will, you should try to be as detailed as possible to avoid confusion. Also, when you name people to be beneficiaries, etc., it would be best to include their identity numbers so that they cannot be mixed up with somebody else. However, you also do not need to describe every one of your possessions – rather, choose the people you want to give specific items to and describe those. Then you can leave 'the rest' (also known as the 'residue' of your estate) to a group of people or a particular person. How you describe things can be important as the law might have a specific way of giving meaning to a word that you do not. For instance, when you refer to 'children' in your Will, the law will always take this to include:

- Children born from your current marriage and previous marriages;
- Children born outside of your marriage; and
- Legally adopted children.

A Will can cover many things, including funeral plans. However, it may be a better idea to inform loved ones of how you wish your

funeral to be conducted so that the details can all be arranged as soon as possible.

You should always try to keep your Will as simple and as clear as possible, to avoid disagreements.

Remember

It is always best to seek legal assistance in drawing up your Will (especially if it is complicated by trusts or large numbers of beneficiaries, etc.) and there are many legal advice centres which may even give you some assistance for free. Your bank may also be able to help you draw up a Will, but when they do so they tend to insist that you then appoint them as your executor, which is something you may not wish to do.

In drawing up your Will you must also remember that the type of marriage contract you were married under will affect what the law considers your property to be. For instance, if you were married in community of property you will have to add together all your things, as well as those of your partner, and then divide that in half to find out what is actually considered to be yours.

Finally, always remember to try to keep your Will as current and up-to-date as you can. As your estate changes, and your relationships change, you will probably want your Will to change as well to reflect this all.

Ms G Razzano (Honorary Member)

DECEASED ESTATES

When someone dies it becomes necessary to deal with all the things that belonged to that person during his or her lifetime. All the assets of a deceased person belong to that person's estate until they are dealt with in accordance with that person's Will or, if there is no Will, in accordance with certain rules that determine who gets the deceased's money and assets (the rules of intestate succession). When one knows and understands the process surrounding deceased estates, a lot of the fear and mystery is removed which will hopefully make the sorrow a little easier to bear.

Reporting an Estate

All deaths must be reported to the Master of the High Court. In Pietermaritzburg, the Master's office is housed in two buildings. The main office is in the Court Gardens at the corner of Church and Chief Albert Luthuli (Commercial) Roads and the contact telephone number is (033) 264 7000/7018. The second office is situated in Main City Building at 206 Langalibelele (Longmarket) Street. The contact number is (033) 341 3800.

When reporting an estate, the deceased's death certificate and Will must be handed to the Master who will open a file and issue a reference number. There are also forms that need to be filled in. These include a Death Notice, which has the details of the deceased and close relatives. There is also an Inventory of Assets, which will have details about any fixed property such as houses or land, moveable items such as furniture and motor vehicles and any shares or bank accounts the deceased had. Values of these assets must be given as accurately as possible when filling in this form, although valuation certificates will be obtained to verify the values when the estate account is finalised and sent to

the Master. If you have been nominated as Executor in a Will you will need to fill in a request for this appointment.

Where an estate does not exceed R125 000 in value an Administrator is appointed. The job of the Administrator is not as difficult as that of an Executor. The Master will (probably) only appoint someone as an Executor if he or she has appointed an attorney, accountant or trust company to do the actual winding-up of the estate.

What is involved in the winding up process?

The Executor's job is to wind up the estate. Sometimes, if it is affordable, the deceased's family will appoint an Attorney to wind up an estate which is not worth more than R125 000. However, where the estate is worth more than R125 000, the family is required to be assisted by an attorney, public accountant or trust company and the fees, which are on a fixed tariff (at the moment 3.5% of the total value of the estate), will come out of the estate itself. Most banks draft Wills and can also administer your estate. You would need to speak to your bank to find out more about the process and about the costs involved. Whether you use a bank or not, it is always a good idea to have a Will.

A bank account must be opened in the name of the estate and all moneys collected on behalf of the estate paid into that account. The Executor will place an advert in the local paper and Government Gazette advising of the death of the deceased and asking all people who owe money to, or who are owed money by, the estate to advise of these claims within 30 days. The Executor will also get values of all the estate assets. These could be certificates from the bank in respect of bank accounts or valuations from sworn valuers in respect of other items such as furniture, jewellery and cars. Once all the assets are accounted for and valued and all the claims received, an account, called the First and Final Liquidation and Distribution Account, is drafted.

This account shows all the assets and liabilities of the estate and how the residue is distributed. The Master will then indicate whether the account is acceptable and instruct the Executor to advertise (again in a local newspaper and Government Gazette) that interested parties may inspect the account for a certain period. If no objections are received after 21 days, the Executor must then pay any claims and distribute the residue of the estate as set out in the account. Once this has been done, all the receipts are sent to the Master who will then issue a certificate confirming that the estate has been finalised and that the Executor is relieved of his or her duties.

Mr M Serfontein

YOU AND YOUR GRANT

Social Assistance is an income transfer in the form of grants provided by government. All social grants (hereafter referred to as “grants”) are paid by the South African Social Security Agency (SASSA). These include a disability grant, a grant for older persons, a war veteran’s grant, a foster child grant, a care dependency grant, a child support grant and a grant-in-aid.

Since 1 April, 2006, the responsibility for the management, administration and payment of social assistance grants was transferred to SASSA from the Provincial Departments of Social Development. SASSA is a section 3A public entity, the focus institution responsible for ensuring that government pays the right grant, to the right person, at a location which is most convenient to that person.

1. Qualifying requirements in respect of the different types of grants

1.1 Grant for Older Persons

The applicant:

- (1) must be a South African citizen/permanent resident;
- (2) if male, must be 61 but, as from 1 April 2010, at 60 you can apply;
- (3) if female, must be 60 years or older;
- (4) and spouse must comply with the means test;
- (5) must not be maintained or cared for by a state institution; and
- (6) must not be in receipt of another social grant.

1.2 Disability Grant

The applicant must:

- (1) be a South African citizen/permanent resident or refugee;
- (2) be 18 to 59 years of age, if female, and 18 to 60 years of age if male;
- (3) submit a medical/assessment report confirming disability from the treating doctor;
- (4) not be maintained and cared for at a state institution;
- (5) not be the recipient of another social grant in respect of himself/herself; and
- (6) meet means test requirements.

1.3 War Veterans Grant

The applicant must:

- (1) be a South African citizen/permanent resident;
- (2) be 60 years and over or must be disabled;
- (3) have fought in the Second World War or the Korean War;
- (4) along with his or her spouse, meet the requirements of the means test;
- (5) not be maintained or cared for by a State Institution; and
- (6) not be in receipt of another social grant in respect of himself/herself.

1.4 Child Grants

There are three different child grants, the requirement for each have been set out below.

1.4.1. Foster Child Grant

- (1) The applicant and child must be resident in South Africa;
- (2) there must be a court order indicating foster care status; and
- (3) the foster parent must be a South African citizen, permanent resident or refugee.

1.4.2. Care Dependency Grant

- (1) Must be a South African citizen/permanent resident;
- (2) the age of the child must be less than 18;
- (3) a medical/assessment report confirming permanent, severe disability, must be submitted;
- (4) the applicant and spouse must meet the requirements of the means test (except for the foster parents); and
- (5) the care-dependent child or children must not be permanently cared for in a state institution.

1.4.3. Child Support Grant

- (1) The primary care giver must be a South African citizen or permanent resident;
- (2) both the applicant and the child must reside in South Africa;
- (3) the child must be under the age of 16 years;
- (4) the applicant and the spouse must meet the requirements of the means test; and
- (5) no-one can apply for more than six non-biological children.

1.5 Grant in Aid

The applicant:

- (1) must require full-time attendance by another person owing to his/her physical or mental disabilities;
- (2) must not be cared for in an institution that receives a subsidy from the State for the care/housing of such beneficiaries; and
- (3) must not be in receipt of a grant for an older person, disability grant or a war veteran grant.

1.6 Social Relief of Distress

Social Relief of Distress (SRD) is the temporary provision of assistance intended for persons in such dire need that they are unable to meet their or their families most basic needs. SRD is paid to South African citizens or permanent residents who have insufficient means and meet one or more of the following criteria:

- (1) the applicant is awaiting the approval of a social grant;
- (2) the applicant has been found medically unfit to undertake remunerative work for a period of less than 6 months;
- (3) no maintenance is received from a parent, child or spouse obliged in law to pay maintenance and proof is furnished that efforts made to obtain this have been unsuccessful;
- (4) the bread winner is deceased and application is made within three months of the date of death;
- (5) the applicant has been affected by a disaster, as defined in the *Disaster Management Act, 2002*;
- (6) the person is not receiving assistance from any other organisation; or

- (7) refusal of the application for social relief of distress will cause undue hardship.

1.6.1 Period of Social Relief of Distress

SRD is issued monthly for a maximum period of three months. An extension for a further three months may be granted in exceptional cases, on the recommendation of a social worker. No person who is in receipt of a social grant may receive the grant and social relief of distress simultaneously. Any person who received both social relief and a grant must repay the value of the social relief of distress received. This will be recovered from subsequent grant payments.

2. Proof of identity

Applicants who do not have a 13-digit bar coded identity book, or birth certificate for children involved in an application, can still apply for a grant. Please obtain information from your nearest SASSA office on the alternative documents which are accepted for grant applications.

3. Where do you apply for a grant?

- (1) You apply at the SASSA Office nearest to where you live;
- (2) if you are too old or sick to travel to the office to apply for a grant then a home visit can be arranged;
- (3) applications are free of charge;
- (4) if your application is not approved by SASSA, you must be informed in writing as to why your application was unsuccessful; and
- (5) if your grant is approved, you will be paid from the date on which you applied.

4. Appeal

If your application is unsuccessful, you have a right to appeal to the National Minister for Social Development in writing,

explaining why you disagree with the decision. This appeal must be lodged within 90 days of notification of the outcome of your application.

5. Method of Payments

You can receive your grant by the following methods:

- (1) cash payments at designated pay points;
- (2) banks;
- (3) institutions; or
- (4) if you are unable to collect the grant yourself you may nominate a procurator to collect on your behalf.

6. Suspension of Grants

The following may result in the suspension of a grant:

- (1) changes in circumstances (financial and medical);
- (2) outcome of a review;
- (3) failure to co-operate when a grant is reviewed; or
- (4) conviction for fraud.

7. Restoration of Grants

An application must be made for restoration of a grant within 90 days of the suspension.

8. Main reasons for lapsing of grants

- (1) death;
- (2) admission to state institution;
- (3) the grant is not claimed for three consecutive months;
- (4) the period of temporary disability has lapsed;
- (5) you are absent from the republic; or
- (6) you cease to be a refugee (disability and foster child grant only).

9. Reviews

You must declare your income at the time of application. This will form the basis on which SASSA will decide whether your grant must be reviewed. You will be notified three months in advance of the date of the review or the date on which the life certificate is due.

10. Responsibility of the Beneficiary

It is the responsibility of beneficiaries to keep SASSA informed of changes in their circumstances and means.

11. What is a means test?

In South Africa, Social Assistance is subjected to means testing which implies that SASSA evaluates the income and assets of the person applying for social assistance in order to determine whether the person's means are below a stipulated amount. This means test is a way of determining whether a person qualifies to receive a grant and grants are indeed meant for those who have insufficient means to support themselves.

12. Fraud

SASSA exercises zero tolerance to fraudulent activities. Report grants fraud at this number: 080 060 1011.

13. Customer care

If you have a complaint or queries about your social grants please contact customer care on this number: (033) 846 3390.

Adv B Mbili

INDEPENDENT CONTRACTORS AND TES WORKERS

What are your rights?

Introduction

After 1994, our new government went on a campaign to reform the labour industry in our country. However, many of the new laws have, in fact, actually made different types of workers more vulnerable, especially as employers try to find creative ways of avoiding the more progressive laws protecting workers, thus ignoring the government's good intentions. This has become a particularly real problem with the economic downturn, as employers try to minimise costs wherever possible, even if this means using methods which are at their employee's expense. One such tactic has seen employers increasingly move from using permanent employees to independent contractors and employing through labour brokers. What labourers need to know now is what these types of employment may mean for their labour rights.

A note on definitions

It should be noted early on that the definitions from the Acts mentioned here refer only to people earning under around R115 000 a year (the legislature might change this amount through Regulations every now and then); a discussion of who might constitute an employee if they earn more than that a year will not be dealt with. Just note that, if you do earn more than this amount, if you go to the Commission for Conciliation, Mediation and Arbitration (CCMA), or another form of labour tribunal, you may be placed under a heavier burden than those earning less to actually prove that you are an employee at all.

What is an independent contractor?

The Labour Relations Act (LRA) and the Basic Conditions of Employment Act (BCEA) place a lot of demands on employers to treat you in a specific way (for example, making it more difficult for them to fire you and demanding that you be given a certain amount of annual and sick leave, etc.). Many employers consider these laws to be very burdensome as they are some of the most progressive labour laws in the world. However, the LRA does not protect someone who is an 'independent contractor' – they are expressly excluded from the Act.

The question then becomes: who would be an independent contractor? Very simply, an example of when you would be an independent contractor, instead of an employee, would be, for instance, if you were working as a self-employed plumber in another person's home. You are considered by the law to be a 'free agent' who is self-sufficient and therefore also responsible for your own well-being.

How protected are you?

As you may have realised from the above, if an employer can show that you are an independent contractor then you can have none of the protections offered of the LRA, put in place by the South African government to protect you, including the right not to be unfairly dismissed! However, in an attempt to make sure that employers cannot too easily avoid the LRA or BCEA, the law will presume you are an employee if you show any of the following:

- that the manner in which you work is subject to the control or direction of another person;
- that your hours of work are subject to the control or direction of another person;

- if you are working for an organisation, that you also form part of that organisation;
- that you have worked for that other person for an average of at least forty hours per month over the last three months;
- that you are economically dependent on the person for whom you work or render services;
- that you are provided with tools of trade or work equipment by the other person; or
- that you only work for, or render services to, one person.

This is sometimes referred to as the 'dominant impressions' tests – you can see that it basically just tries to see whether or not you are really independent and without a 'boss'. In fact, the law may even presume you to be an employee if you can show the above, even if you have an agreement with your employer which says you are an independent contractor. However, as it is only presumed, an employer could always show otherwise with enough proof. This might seem confusing, or difficult, to prove, but you can always approach the CCMA, addressed later, if you and your employer have a disagreement on what type of relationship you have.

What is a temporary employee?

Another way employers attempt to avoid the laws of the LRA and BCEA is by hiring employees through employment agencies and labour brokers, also referred to as 'temporary employment services' (TES). In this arrangement, the TES then hires you out to other people who need you to work, and take a fee for themselves for doing so. This does not mean that the LRA or BCEA is not applicable to you, but it does, however, complicate matters when you are trying to determine who your employer is. This 'outsourcing' kind of arrangement is becoming an increasingly common form of employment in the recession, when employers

are trying to reduce their obligations to employees as much as possible.

How protected are you?

If you are employed by a TES to work for someone else (let us call this person 'Mr A'), then you can only hold the TES liable – the TES is technically your employer, even if you might not seem to be doing the actual work for them. This then means that, even if Mr A fires you unfairly, the only person you will be able to take to the CCMA, or to whom you will have recourse, is the TES. It is therefore always important to remember that, when you are employed by a TES, regardless of the existence of the Mr A, any complaint you have about your employment which you may want to pursue (for instance an unfair dismissal you want to take to the CCMA) can only be taken against the TES. The TES should therefore still be providing you with the benefits promised to you by the BCEA.

This might not seem to be such a bad arrangement then. However, there is a further complication. If Mr A merely 'requests' a new person from the agency instead of you, even if for no reason, it should clearly constitute an unfair dismissal (as you will not be being paid), but you may be considered to not have been dismissed at all as you are still technically employed by the TES! This means that employers abuse the TES system in such a way that you technically remain employed, even with no work – making it much more difficult for you to get compensation.

Potential change in the air

The Minister of Labour has recognised the abuses some employers have been trying to get away with – and with this in mind the Minister has stated the intention to do away with 'labour brokering' through new laws. This is because, as you probably also noticed in our discussion about the TES and Mr A, it is often too difficult with these different type of arrangements

to determine who the employer is – and also who the employee might be. This means that when abuses of labourers happen it is difficult to pinpoint who should be held liable. Trade Unions such as COSATU have been particularly vocal in their support of the Minister's potential reforms.

What to remember

Labour matters can be both complicated and expensive. An added issue is the fact that the Legal Aid Board does not provide free assistance in regard to labour matters. However, if you have a labour dispute which needs deciding, you can approach any CCMA branch for assistance. The contacts for the different branches can be found at the CCMA website at www.ccma.org.za. There are also useful information brochures on different labour matters, and labour problems, available for free on www.labourguide.co.za. While these can never replace a good legal opinion, it will provide a good starting point for you and will at least provide a basic knowledge of what your rights should be.

In spite of signs of positive change, you must remain aware of the potential ways in which employers try to deprive you of your rights and, when choosing the kind of jobs you take, always bear in mind potential limitations to your rights that different type of employment relationships might have. If there is nothing else you should know, it is simply that you have far fewer protections than a normal employee if you are categorised as an independent contractor or a TES employee. Do your best, if involved with these forms of employment, to ensure you are a member of your relevant Trade Union to maximise your protection against abuse. Also, always remember that, if an employer is trying to offer you any kind of contract which avoids paying you for working on public holidays or giving you sick/annual leave and any other normal BCEA rights, you should consult with someone – chances are they not able in law to do this.

BUILDERS

What you need to know

Building or altering a house is a very expensive exercise, and it is important that you are made aware of your rights in case anything goes wrong. Many people have experienced issues with their builders, which have ranged from shoddy work, to builders running away with their money before anything was completed. To try and ensure that this doesn't happen to you we will look at steps to take in choosing a builder, as well as possible steps to take once a builder has already been chosen.

Using a registered builder

This is the easiest and most important step in choosing a builder: you should always choose a builder who is registered with a legitimate builders association. These associations try to create standards by which builders must operate if they are registered with the association. It thus also provides you with a body to approach directly if you are having problems with a builder who is registered with them.

One of the key national organisations is the National Home Builders Registration Council. This Council was set up by the *Housing Consumers Protection Act*. The Council requires that all its builders agree to a Code of Conduct, but also to build all houses to the quality demanded by the Council. You can contact the Council toll free at 0800 200 824, or visit their website on www.nhbrc.org.za. Another useful aspect of checking whether a potential builder is registered with them is that they also keep a list of builders that have been suspended, or even deregistered, from membership because of poor performance, etc. Also, if you have had a problem with a builder who is part of the Council, you can lay a complaint directly with them. They will then investigate

your complaint, and follow this up with a mediation process between you and your builder to help investigate the complaint. They can then deregister a builder if they agree with you. They also provide you with additional protection by providing a warranty (which you do not have to have expressly provided for in your building contract) for a certain period of time against any defects which may only show after your registered builder has finished the job and left.

If you do not agree with a decision the Council has made after you have laid a complaint, you are able to appeal the decision to the Council again. Further, if you have a complaint about the way in which the Council itself has acted, you can lodge a complaint against them with the Public Protector - you can visit their website at www.publicprotector.org.

You can also check against other forms of legitimate builders associations which your builder might be registered with, like the regional association of the Gauteng Master Builders Association – you can view their website at www.gmba.org.za (there is also a KwaZulu Natal Master Builders Association, etc.). Another important association to consider is called the Building Industries Federation of South Africa (BIFSA) who can provide very helpful assistance in drawing up building contracts.

Other tips for choosing a builder

There are also some more practical tips to consider when picking a builder. Firstly, you should try to get referrals from people you know about good builders that they have used before. If you know an architect, or in fact used one, they would also be a good source for getting referrals.

When deciding who to pick, you should try to get quotes from at least three builders so that you have enough information to properly compare.

Be sure to follow up and check on your builder's provided references. You can even go to view current projects they have said they are working on and see if you can find any extra information there.

Remember to check that your potential builder has a valid insurance policy in place. You might also wish to contact your own insurance company and alert them to the fact you are having building done, in case of any accidents which may occur.

Drawing up your contract

With bigger building jobs it is always suggested that you draw up a contract. While below I outline some things to consider in the drawing up of a contract, these things are in no way all that you will need to consider in the contract. Contracts are complicated documents that create lots of duties for both you and the builder and it is therefore important that you seek legal advice when you are drawing them up. You can also approach your regional Master Builders Association for additional assistance. By approaching other organisations for help, especially organisations such as BIFSA, who provide you with a nice standard form contract, they will be able to check for you that you get the most favourable terms and will be able to point out things about how the contract would work which you may have missed.

Building contracts are drawn up with your builder once you have accepted their quote for the work. Before choosing the best quote, you should ensure that the quotes are comprehensive, to avoid any unforeseen costs popping up during the building later. This is why you should get quotes which are broken down into the costs of specific areas of building, rather than just a lump sum. Remember to look for things such as taps and finishes, as these things can add on significant costs later.

An important part of the contract is outlining how the payment will work, which you should actually think about long before you commit to a specific contract. It is very important that you are always wary of providing money up front before building. Try as much as possible to arrange for reasonable payment plans which focus mainly on paying for work that has been done rather than work which is still to be done in the future. This minimises the risk of a builder running off with your money before he has completed all that he was meant to do.

If you disagree with a part of the contract, you can point this out and do not have to sign it. However, you should note that the builder also does not have to accept leaving that term out and might then choose to not sign the contract either.

Other things to think about are:

- What will happen if the goods the builder uses are faulty – will it be your problem, the builders, or the person who supplied the goods?
- What timelines do you need to be met by your builder?
- If your builder fails to build within the times you have given, will this be considered a breach of contract, or will it perhaps just mean that he is required to pay a penalty to you to compensate?
- If you have a dispute about the contract, how will you resolve it – will it be at the Council, or perhaps through arbitration?
- Importantly, you should include what will happen if you find any defects in the house – will the builder be liable for two months after completing the job, or even six months?

Having a good and solid contract will provide you with extra protection outside of the Council. If the builder fails to complete the work, or to complete the work in time, or fails in any other part of the contract, this will constitute a breach of your contract. You would then be entitled to sue the builder for damages which resulted from that breach. In this case, it is best to approach a legal advisor to help you take the matter further.

Other parties

Although you can hire the additional people needed directly it is most common for your builder, as your contractor, to sub-contract other experts to help. However, you should be aware of their qualifications as well. You should check, for example, that the electrical and plumbing subcontractors are also registered with any of their equivalent associations. The Electrical Contractors Association can be contacted on (011) 392 0000.

Extra points to remember

Even before you have started to think about a builder, you should have in place detailed plans for your building and should have made sure that the alterations or building you wish to do does not require special planning permission from your Local Authority. Just make a call or visit to your Local Authority to find out. If the alterations are small, even though you may not need detailed plans, you should still make sure that you have a very clear and detailed description of what you wish to have carried out to avoid any unnecessary conflict between you and your contractor.

Also, always remember to make a full and proper final inspection. Do not sign off that you are satisfied with this final inspection until you are completely sure that everything has been correctly done.

There are other common law rights which may help to protect you if you have had defective work from a builder, such as an 'implied warranty' that the builder must perform his work properly in any building contract. This is why it is very important to seek additional legal advice, so that you know you have covered every potential source of protection that the law can give you in the case of a dispute.

Ms G Razzano (Honorary Member)

